NAGAPPAN KUPPUSAMY

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
HASHIM YEOP SANI SCJ
WAN HAMZAH SCJ
[CRIMINAL REFERENCE NO. 3 OF 1986]
29 FEBRUARY 1988

CRIMINAL LAW AND PROCEDURE: *Questions of law to Supreme Court - Courts of Judicature Act 1964 - Section 66(1) - Charge under s. 420 Penal Code - Accused called to enter defence - Whether there is in law a burden cast upon him to prove any of the facts upon which his defence is based - Applicant acquitted and discharged at end of defence case as Magistrate found reasonable doubt has been created - Appeal by Public Prosecutor - Retrial ordered by High Court.*

CRIMINAL LAW AND PROCEDURE: *Burden of proof - To obtain an acquittal - Whether in law it is incumbent upon accused to prove facts upon which he relies on a balance of probabilities or is it sufficient to cast a reasonable doubt on prosecution case.*

In this case the following two questions were posed to the Supreme Court under s. 66(1) of the Courts of Judicature Act 1964:

(a) Whether on a charge under s. 420 of the Penal Code where an accused person is called upon to enter his defence there is in law a burden cast upon him to prove any of the facts upon which his defence is based.

(b) If the answer to question (a) is in the affirmative then, to obtain an acquittal whether in law it is incumbent upon an accused person to prove the facts upon which he relies on a balance of probabilities, or is it sufficient to raise a reasonable doubt.

Held:

[1] In a criminal proceeding, to earn an acquittal for an offence under s. 420 of the Penal Code an accused has only to cast a reasonable doubt on the prosecution case.

[2] The order for retrial by the High Court was ordered to be set aside.

[Answered accordingly.]

Cases referred to:
Jayasena v. The Queen [1970] 1 All ER 219
R. v. Carr-Briant [1943] KB 607
PP v. Yuvaraj [1969] 2 MLJ 89
Looi Wooi Saik v. Public Prosecutor [1962] 28 MLJ 337

Legislation Referred to:
Courts of Judicature Act 1964, s. 66(1)
Evidence Ordinance 1950, ss. 101, 102, 105
Penal Code, ss. 302, 420

For the appellant - Manjeet Singh; M/s. Manjeet & Associates
For the respondent - T.S. Sambanthamurthi, DPP

JUDGMENT

Hashim Yeop Sani SCJ:

Two questions were posed to us under s. 66(1) of the Courts of Judicature Act 1964 as follows:

(a) Whether on a charge under s. 420 of the Penal Code where an accused person is called upon to enter his defence there is in law a burden cast upon him to prove any of the facts upon which his defence is based.

(b) If the answer to question (a) is in the affirmative then, to obtain an acquittal whether in law it is incumbent upon an accused person to prove the facts upon which he relies on a balance of probabilities, or is it sufficient to raise a reasonable doubt.

The applicant was originally charged in the Kajang Magistrate's Court for an offence under s. 420 of the Penal Code. He claimed trial and the matter proceeded for several days. In the event, at the end of the prosecution case the learned Magistrate ruled that a *prima facie* case had been established against the applicant on the amended charge and called upon the applicant to enter his defence.

Upon hearing the evidence for the defence, the learned Magistrate held that a reasonable doubt had been created and on 17 July 1984 she accordingly acquitted and discharged the applicant. On 25 July 1984 the Public Prosecutor filed in a notice of appeal against the order of acquittal.

During the course of the hearing of the appeal, the learned Judge stated that he was bound by the decision of the Privy Council in *Jayasena v. The Queen* [1970] 1 All ER 219 and that if an accused person wished the Court to believe in the existence of a particular fact then the burden lies on him to prove it.

The learned Judge thereupon allowed the appeal and ordered a retrial of the applicant before another Magistrate. Thus the reference.

The evidence for the prosecution was based on the testimonies of three principal witnesses, PW1 and PW2 (the complainants) and PW3. In their evidence they stated that they were businessmen and were friends and that PW1 and PW3 were nephew and uncle respectively. PW3 also admitted in his evidence that he had previous experience in land matters.

Briefly the prosecution story was that the applicant and another person with the name of Zuri (still at large) came to Pontian and informed PW1 that there was a piece of land for sale for RM120,000. PW1 was also told that if he wanted to purchase the land he should make a deposit of 10% of the purchase price. A total sum of RM11,000 was paid to the said Zuri and RM900 to the accused. Subsequently PW1 came to Kajang to look for the accused with PW2 and another friend. PW1 then said that on seeing them the accused fled in his car. They gave chase and the accused drove straight into the Kajang police station where a report was later lodged by both parties.

The applicant gave evidence on oath and said that there was no land transaction at all as alleged by the prosecution. The money transaction was not for land but for the purchase of counterfeit money. The applicant said he merely witnessed the handing of the money to the said Zuri for the purchase of the counterfeit money. In his evidence the applicant said that what was agreed was that the exchange rate would be RM11,000 for RM35,000 forged notes. A cautioned statement of the applicant was also tendered in evidence.

In her grounds of decision the learned Magistrate stated that at the close of the defence she found that the defence had cast a reasonable doubt on the prosecution case. She also made certain findings that:

(a) it would be difficult to believe there has been any land transaction as alleged by the complainants because there was a complete absence of evidence of any discussion on the nature of the land;

(b) there was surprisingly no evidence of any request for particulars of the land before payments of the deposit;

(c) PW2 and PW3 being experienced businessmen while PW3 had been a land broker could not have overlooked to ask for particulars of the land before making any commitment on the deal.

Apart from those grounds it would appear that the following facts could not have been overlooked by the Magistrate viz., the amount of money paid as deposit (RM11,000) does not in fact constitute 10% of the alleged purchase price of RM120,000. Indeed according to the defence the arrangement was that RM11,000 was the sum required to purchase RM35,000 counterfeit money.

Finally there is some consistency between the evidence of the applicant and the cautioned statement made by him.

In our view the learned Magistrate was perfectly entitled to come to her conclusion at the end of the trial. But what about the questions posed?

Here we have to go back to first principles. In a criminal proceeding the onus on the prosecution throughout is to prove beyond reasonable doubt. From the beginning to the end the burden remains on the prosecution to prove the guilt of the accused. At the close of the whole case the Court has to consider all the evidence adduced by both the prosecution and the defence and has to be satisfied that the case has been proved beyond reasonable doubt.

In other words at the close of the whole case the Court has to consider all the evidence before it whether they satisfy all the ingredients of the offence. If upon the whole evidence the Court is left in a real state of doubt the prosecution is said to have failed to satisfy the onus of proof which lies upon it.

How much evidence is to be adduced depends on the nature of the requirement. Where the burden is shifted to the defence by a statutory presumption the test in *R. v. Carr-Briant* [1943] KB 607 and adopted in *PP v. Yuvaraj* [1969] 2 MLJ 89 would be applied as applied in civil proceedings namely on the balance of probabilities.

In *Jayasena* the question before the Privy Council was whether the jury was rightly directed on the burden of proof on the issue of self-defence in a trial for murder. It dealt with the exercise of the right of self-defence or more appropriately called the right of private defence in the Penal Code which is an exception in the Penal Code.

In *Looi Wooi Saik v. Public Prosecutor* [1962] 28 MLJ 337 the appellant was also convicted of murder under s. 302 of the Penal Code and the only question in issue was whether by reason of provocation the killing amounted to something less than murder. The sole question before the Court of Appeal was the correctness of the Judge's direction on provocation. The Privy Council in *Jayasena* did not seem to find complete favour with *Looi Wooi Saik* but we find the following observations of Thomson CJ pertinent and relevant for our purpose.

The learned Chief Justice pointed out that the general exceptions and special exceptions contained in the Penal Code are specifically dealt with in s. 105 of the Evidence Ordinance 1950 which reads as follows:

> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

But s. 105 should not be read in isolation but must be read in relation to the Ordinance as a whole. In particular ss. 101 and 102 which provided in effect that in a criminal case it is for the prosecution to prove the guilt of the accused person. Thus in the words of illustration (a) to s. 101 of the Evidence Act:

> A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime.

We accordingly answered the questions posed simply in the following terms. To earn an acquittal in a criminal proceeding for an offence under s. 420 of the Penal Code an accused has only to cast a reasonable doubt on the prosecution case.

We also set aside the order for retrial.

Also found at [1988] 1 CLJ 283